JAN 23 1943
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 652

CARL HALFERTY AND J. B. HALFERTY, DOING BUSINESS AS HALFERTY BROTHERS, ET AL., PETITIONERS,

VS.

HAWKEYE CASUALTY COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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With whom are:

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I.

This case does not fall within the class of reviewable cases mentioned in Rule 38.

The only question presented for review is whether the Circuit Court of Appeals correctly construed a contract of insurance made by the respondent with the petitioners. In the language of the petition for the writ:

> "Only the construing of an insurance policy or bond is involved in this case" (Petition p. 4).

Briefly stated, the case is this:

In September, 1941, one O'Connor, a farmer, by a special or individual contract, employed petitioners, who were engaged in the trucking business, both as a motor carrier (which means "common carrier," R. S. Mo., Sec. 5720 (b)), and as a contract hauler (which means one engaged in the transportation of persons or property for a particular person under special agreement, R. S. Mo., Sec. 5720 (c)), to haul sargo from the fields on his farm to

silos located on the same farm for an agreed price. One of the trucks owned by petitioners was used in that work. At the end of a work day a number of men employed in the field by O'Connor obtained the consent of the driver of the truck to allow them to ride on it to Plattsburg, a distance of three or four miles, where the truck was to be stored for the night. While riding on the truck an accident occurred, resulting in injury to four of the passengers and the death of one of them. Five suits were instituted in the state circuit court against petitioners and the driver of the truck to recover damages.

Prior to the accident the petitioners had applied to and received from the Public Service Commission of Missouri a Certificate of Convenience and Necessity authorizing them "to operate as motor carriers of freight over an irregular route from a point approximately four miles from Gower, Missouri, to all points in Missouri and from all points in Missouri to said point of operation" (Rec. 96). The Commission required the petitioners to and they did file and publish their schedule of rates as common carriers. They were also required to and they did procure and file a policy of insurance issued by respondent by which respondent agreed "to pay any final judgment rendered against the assured, for personal injuries, including death resulting therefrom, to all persons, except employes of the assured, engaged in the course of their employment and/or damage to property * * * caused by any and all motor vehicles operated by the assured pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri within the limits set forth in the schedule hereon" (Rec. 75).

A controversy having arisen between petitioners and respondent as to whether the respondent was obligated, under the terms of the policy, to defend the suits for damages or pay the judgment recovered in any of them, respondent brought an action in the District Court of the United States under the Federal Declaratory Judgment Act to obtain a judgment declaring that it was not re-

quired to defend or pay any judgment recovered in any of the damage suits on the ground that, at the time of the accident, the truck was not being operated "pursuant to the Certificate of Convenience and Necessity" and therefore was not within the policy coverage. The petitioners contended that the words in the endorsement "pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri" should be ignored in construing the policy; and that the truck was within the coverage if, at the time of the accident it was being *operated*—whether for the owners' pleasure, or to transport their own property, or to accommodate a guest who desired to ride, or what not.

The court below construed the policy and held that the truck was not within the coverage at the time of the accident because at that time it was not being operated pursuant to the Certificate of Convenience and Necessity (Appendix A, p. 21 *et seq.*). In so holding the court followed one of its own decisions, the decision of the Supreme Court of the State of Kansas, in *Smith* v. *Republic Underwriters,* 152 Kan. 305, 103 Pac. 2d 858, construing an identical policy endorsement required by the State of Kansas, and other cases cited in the opinion.

As stated in the opinion of the court below, no authority was cited by petitioners there, and not a single case is cited in this court showing that the construction put upon the policy by the court below is contrary to the opinion of any federal court, or of the Supreme Court of Missouri or any of its Courts of Appeal, or of any Court of any other state.

II.

None of the three cases cited by petitioners as warranting the issuance of the writ is applicable.

In *Gay* v. *Ruff,* 292 U. S. 25, 78 L. Ed. 1099, the court granted certiorari because of a conflict in the decisions of the federal courts on a question of federal law.

In *Electric Fittings Corporation* v. *Thomas & Betts Company*, 307 U. S. 241, 83 L. Ed. 1263, the writ was granted because of the conflict of decision between the Circuit Court of Appeals of the Second and Ninth Circuits in a patent case.

In *Worchester County Trust Company* v. *Riley*, 302 U. S. 292, 82 L. Ed. 268, the writ was granted because the case involved "an important question of Federal law which has not been but should be settled by this court."

In the instant case, there is no conflict of opinion between the court below and any other federal (or state) court. Nor is there any question of federal law involved. No question was raised in the court below as to the jurisdiction of the trial court under the Federal Declaratory Judgment Act, nor as to the validity, construction or application of that Act; and no such question is presented here.

The case involves only the construction of a contract of insurance between an insurer and the assured; and the liability of the insurer under the policy as construed on the particular facts shown in the record. We submit the writ should be refused.

Respectfully submitted,

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